

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10 – ATLANTA, GEORGIA  
SUBREGION 11 – WINSTON-SALEM, NORTH CAROLINA

FedEx Freight, Inc.,  
Employer,

and

Case 10-RC-136185

International Brotherhood of Teamsters,  
Local Union No. 71, a labor organization affiliated with,  
International Brotherhood of Teamsters,  
Petitioner.

**Petitioner Teamsters Local 71 Opposition to Employer Request for Review**

International Brotherhood of Teamsters Local Union No. 71, a labor organization affiliated with, International Brotherhood of Teamsters, Petitioner in the above-referenced case, files this statement, pursuant to Section 102.69(c)(4) and, by reference therein, Section 102.67(e) of the Board's Rules and Regulations, in opposition to the Employer's Request for Review, filed December 29, 2014. The Employer seeks review of the Regional Director's Supplemental Decision and Certification of Representative issued December 12, 2014, pursuant to Section 102.69(c)(3)(ii) of the Board's Rules and Regulations. The tally of the November 19, 2014<sup>1</sup> election showed: approximately 222 eligible voters, 110 votes for Petitioner; 97 votes against Petitioner; 4 ballots challenged; 1 void ballot.

The Employer's single Objection states:

"In contravention of Board procedures, the Board Agent conducting the election allowed a voter to cast an unchallenged ballot after the polls had closed without consulting with the Parties to obtain their consent for the ballot to be cast without challenge. Indeed, the Board Agent neglected her obligation (1) to obtain

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<sup>1</sup>The 11/19/2014 election was conducted in the following appropriate unit of employees: **Included:** All full-time and regular part-time Road Drivers and City Drivers employed by the Employer at its 4349 Scott Futrell Drive, Charlotte, North Carolina terminal; **Excluded:** all other employees, Dockworkers/Driver Apprentices, Supplemental Dockworkers, Mechanics, building and custodial employees, office clerical employees, and guards and supervisors as defined in the Act.

agreement of all Parties for the late-arriving voter to cast a ballot; and (2) absent such agreement of all parties, to challenge the ballot. Accordingly, the integrity of the election has been compromised.”

Employer’s Request for Review in this case must be denied under the provisions of Section 102.67(c). “The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds: (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.” The Employer does not request a hearing on this objection, but seeks review solely on the findings of the Regional Director’s investigation of the objection that a single eligible voter cast a ballot upon an express waiver of challenge from the authorized observers of the parties at the time of, or shortly after, the end of the morning voting session.<sup>2</sup> The Regional Director found that “the Employer has not presented sufficient evidence that the Board agent’s conduct cast a reasonable doubt on the integrity of the election.”<sup>3</sup> The Employer’s Request for Review should be denied by the Board as it raises no substantial issues warranting review.

### **Board Law and Policy Shows No Merit to the Employer Objection**

Section 102.69(a) of the Board’s Rules and Regulations states, in pertinent part:

“... [A]ll elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending. All elections shall be by secret ballot. ... **Any party may be represented by observers of its own selection, subject to such limitations as the Regional Director may prescribe.** Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. ...” (Emphasis supplied)

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<sup>2</sup> Employer’s Request for Review dated 12/29/2014 at page 2.

<sup>3</sup> Supplemental Decision and Certification of Representative dated 12/12/2014 at page 7.

The Board has been entrusted by Congress with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). To this end, the Board allows each party to be represented at the polling place by an equal number of observers. The observers not only represent their principals but also assist in the conduct of the election and are given the responsibility, inter alia, to identify and check off voters on the eligibility list as they appear to vote. *Monfort, Inc.*, 318 NLRB 209, 209 (1995); NLRB Casehandling Manual (Part Two), Sections 11310, 11322.1.

As the Board stated in *Newport News Shipbuilding*<sup>4</sup>:

“Errors in the important task of monitoring who votes and who votes subject to challenge are minimized by the fact that normally observers from each party in the election are given the responsibility for checking off voters. Thus, inadvertence or misconduct which may not be noticed by the Board agent is often brought to his or her attention by an alert observer. In addition, any discrepancy discovered by an observer may lead to a voter being challenged by either an observer or a Board agent.”

The Regional Director in the present case found that “the Board agent informed the parties that after she had announced that the polls were closed, an additional employee had walked in and asked to vote and that she had allowed him to do so because he could have been in line when she announced the polls were closed. She added that she had asked the observers to sign a waiver stating that they would not challenge the ballot, and she offered to show the parties the Casehandling Manual.”<sup>5</sup>

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<sup>4</sup> 239 NLRB 82 (1978), *affd.* in summary judgment proceeding 239 NLRB 1028 (1978), remanded in part 594 F.2d 8 (4th Cir. 1979).

<sup>5</sup> Supplemental Decision and Certification of Representative dated 12/12/2014 at page 3.

Petitioner Local 71 contends that the Employer's Objection is simply grounded on an erroneous interpretation of Section 102.69(a) of the Board's Rules and Regulations that provide that "[a]ny party may be represented by observers of its own selection." The Employer cannot dispute the agreement of the FedEx Freight observer, a designated representative of the Employer "party" in this representation case, to allow the ballot of the eligible voter to be voted without challenge. The Employer's Request for Review does not deny that the Employer-party's authorized representative under the Board's Rules, in fact, reached an agreement with the Petitioner's authorized observer to waive any challenge to the ballot of the eligible voter at issue.

Where, in all the circumstances, a Board Agent's conduct does not raise a reasonable doubt about the fairness or validity of the election, even if the actions are alleged to be contrary to Board policy, such conduct does not constitute grounds for setting aside the results of the election. *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 263 (4th Cir. 2000) and *NLRB v. Duriron Co., Inc.*, 978 F.2d 254, 259 (6th Cir. 1992). The Regional Director posed the question as "whether the facts indicate that a reasonable possibility of irregularity inhered in the conduct of this election."<sup>6</sup> *People's Drug Stores, Inc.* 202 NLRB 1145 (1973). The Board's Rules and policies, compared to the circumstances involving the non-determinative ballot of one eligible voter shown here, confirm that the Board Agents properly conducted all aspects of the election on November 19, 2014 and the Employer's Request raises no substantial issues warranting review.

#### **Board Agent Conduct in the 11/19/2014 Election Complies with Board Law and Policy**

As the objecting party, the Employer carries the burden "to prove that there has been misconduct that warrants setting aside the election." *Patient Care of Pennsylvania, Inc.*, 360 NLRB No. 76 (4/9/2014); *Consumers Energy Co.*, 337 NLRB 752, 752 (2002). To prevail on

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<sup>6</sup> Supplemental Decision and Certification of Representative dated 12/12/2014 at page 6.

that question, the Employer must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010, 90 S. Ct. 570, 24 L. Ed. 2d 502 (1970).

The Employer's Objection relies solely on Section 11324.1 of the Board's Casehandling Manual (Part Two) Representation Proceedings, which provides:

An employee who arrives at the polling place after the designated polling period has ended is not entitled to have his or her ballot counted, absent extraordinary circumstances, unless the parties agree not to challenge the ballot. *Laidlaw Transit, Inc.*, 327 NLRB 315 (1999); *Monte Vista Disposal Co.*, 307 NLRB 531 (1992). In order to permit an orderly investigation if necessary after the election as to whether there were extraordinary circumstances, the following procedure should be followed when a voter arrives after the designated polling period has ended: the Board agent should determine whether there is agreement of all the parties as to whether such voter should be allowed to cast a ballot; if no such agreement is reached, the Board agent should permit the voter to cast a ballot, which the Board agent should then challenge.

The Board in *Patient Care of Pennsylvania, Inc.*, 360 NLRB No. 76 (4/9/2014) recognized that "the parties have the option of agreeing to allow late-arriving employees to vote." Here, the representatives of the parties, expressly authorized by the Board's Rules and Regulations to exercise challenges, or withhold challenges, agreed, in writing to allow the eligible voter in question to cast a ballot. Because the ballot box remained sealed, and there was no question regarding the eligibility of the voter, there is no question raised by the Employer's Objection affecting the integrity of the election process. See *Patient Care of Pennsylvania*, 360 NLRB No. 76, slip op. at 2-3 fn. 4 (2014) (Member Miscimarra, concurring). The conduct alleged by the Employer objection to the November 19, 2014 election **does not** involve the casting of ballots after the ballot box has been opened for a count.

### **Regional Director properly rejected Employer's claims under *Kerona Plastics Extrusion***

The only claim of departure from officially reported Board precedent cited by the Employer in its Request for Review<sup>7</sup> is under the decision in *Kerona Plastics Extrusion Co.*, 196 NLRB 1120, 1120 (1972), where the Board set aside an election under the following conditions:

“Morning and afternoon voting sessions were scheduled herein, and the Board agent conducting the morning session inadvertently closed the polls 20 minutes early. The Employer contends, inter alia, that this mistake, made in the presence of employees waiting to vote, gave rise to rumors that the Board agent favored the Employer and that said rumors created an atmosphere of confusion, bias, and prejudice against the Employer, which affected votes cast in the afternoon session.”

Here, the Regional Director in his 12/12/2014 Supplemental Decision and Certification of Representative properly found that the Employer failed to meet its burden of providing sufficient evidence as to cast doubt on the fairness of the election.<sup>8</sup>

Here, at most one voter was allowed to vote at a time when he probably should not have been allowed to do so. Even so, there is no assertion he was not, in fact, an eligible voter. Further, the spread of the voting margin favoring the Petitioner was at least 9 votes (110 yes minus 97 no equals 13 minus 4 challenged ballots equals 9). Thus, the employee's casting of his ballot could not have impacted the election. Further, the assertion that some employees may not have voted during the five-hour session of the second portion of a ten-hour election because there “may” have been rumors spread about what had happened at the end of the first session and therefore they may have come too late to the second session expecting to be allowed to vote – only to find no one there to take their vote – is nothing more than sheer speculation.

The second session of the election was conducted by a second Board agent. After the conclusion of the session, the polls were closed. The parties were then assembled for a ballot count in the polling area. The ballot box was then opened, the 212 ballots cast during the two sessions were taken out of the box, and a determination was made as to whether each was validly cast and whether each valid vote was a yes or no vote. Each ballot was then shown to those assisting in the count to verify the type of vote cast. Thereafter, the Tally of

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<sup>7</sup> Employer's Request for Review dated 12/29/2014 at pages 7 and 8.

<sup>8</sup> Supplemental Decision and Certification of Representative dated 12/12/2014 at pages 6-7 and footnote 8..

Ballots was completed by the Board agent, signed by party representatives, and then made available to the parties. Prior to leaving the voting area, the Board agent also had to dismantle the voting booth. At no time during this process, which took considerable time, did any employee arrive at the polling area seeking to cast a ballot after the closing of the polls.

The Employer makes a passing reference in its Request for Review<sup>9</sup> to a case not cited to the Regional Director below, *B & B Better Baked Foods, Inc.*, 208 NLRB 493, 493 (1974). This case was properly distinguished by reported Board precedent in *Jim Kraut Chevrolet*, 240 NLRB 460 (1974) that supports the Regional Director's analysis here, where it states:

"We do not consider it warranted setting aside an election based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed. In order to find such conduct objectionable, we require also that the late arrival of the Board agent caused, or may have caused, eligible voters to be disenfranchised. See *Grant's Home Furnishings, Inc.*, 229 NLRB 1305, 1306, footnote 9 (1977). We note that the Board considered whether voters were disenfranchised in both cases relied on by the Acting Regional Director. ... In *B & B Better Baked Foods*, it was shown that the late arrival of the Board agent possibly disenfranchised at least two employees and that their votes could have been determinative. Similarly, in *Kerona*, it was shown that employees waiting in line to vote may have been disenfranchised when the Board agent closed one of the two voting sessions 20 minutes early...."

The Employer's affidavit evidence presented with its Request for Review does not contradict the Regional Director's finding that **no evidence** of disenfranchised voters was presented in the Employer's single Objection to the November 19, 2014 election.<sup>10</sup> Further there has been no evidence presented by the Employer of even the possible disenfranchisement of a determinative number of voters caused by the two party-designated observers agreeing to allow a late arriving, eligible voter to cast a ballot.

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<sup>9</sup> Employer's Request for Review dated 12/29/2014 at pages 8 and 9.

<sup>10</sup> The Employer's 12/29/2014 Request does not seek review of the Regional Director's Supplemental Decision's overruling of the Employer's "catchall" objection. Compare, Employer's Request for Review dated 12/29/2014 with Supplemental Decision and Certification of Representative dated 12/12/2014 at page2, footnote 4.

There is a qualitative difference in the Board's analysis of delayed or early poll openings or closings caused by Board agent conduct, as in *Kerona Plastics Extrusion Co.*, and *B & B Better Baked Foods, Inc.*, and the matter of the single late-arriving voter dealt with in cases such as *Patient Care of Pennsylvania, Inc.*, 360 NLRB No. 76 (4/9/2014)<sup>11</sup>, where the issue is only addressed when the ballot would be determinative of the result of the election or the voter appears after a ballot box has been opened. The record here confirms that no employee involved in the balloting was even aware that a dispute regarding the alleged Board agent misconduct in allowing the designated observers in the morning session to agree upon the casting of the eligible voter ballot without challenge into the unopened ballot box. There was no objective evidence submitted by the Employer raising a "reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, supra, 174 NLRB at 282.

The Employer's request here is based on mere speculation of the effect of alleged Board agent conduct. The Employer admits that no actual disenfranchised voter has been identified in the proffered evidence. No reasonable evidentiary inference of disenfranchisement can be relied upon from the affidavit presented by the Employer in the record of this representation case under Section 102.69(g) of the Board's Rules and Regulations. No reasonable inference from the evidence presented can support a conclusion that the Board agent's conduct caused a possible disenfranchisement of even a single voter, much less a determinative number of voters. The alleged conduct covered by the Employer's objection did not affect the results of the election. This record confirms that the Regional Director's Supplemental Decision of 12/12/2014 does not depart from officially reported Board precedent on a substantial question of law or policy. No compelling reasons exist for the Board to grant the Employer's Request for Review.

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<sup>11</sup> "The tally of ballots shows 4 for and 3 against the Union, with no challenged ballots."



## **Conclusion**

Petitioner Teamsters Local 71 submits that the Employer's Request for Review should be denied because it raises no substantial issues warranting review.

Date: January 5, 2015

Respectfully submitted,

TEAMSTERS LOCAL UNION NO. 71  
Petitioner, By Counsel:

*s/ James F. Wallington*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing Petitioner Teamsters Local Union No. 71 Opposition to Employer Request for Review in *FedEx Freight, Inc.*, Case 10-RC-136185 on this 5<sup>th</sup> day of January, 2015 upon the Regional Director, by NLRB.gov E-File procedures, and by electronic mail upon the following representatives of the Employer:

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*s/ James F. Wallington*

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